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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 658

HELENE S. COHN,

Petitioner,

vs.

MORRIS B. COHN AND DORA A. COHN,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, DISTRICT OF COLUMBIA CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

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No.

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MORRIS B. COHN AND DORA A. COHN,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, DISTRICT OF COLUMBIA CIRCUIT.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Helene S. Cohn, respectfully shows to this Court as follows:

I

Summary Statement of Matter Involved

This case involves the benefits under a Ten Thousand Dollar ($10,000.00) contract of National Service Life Insurance issued by the Government on the life of Herbert Shel-

ton Cohn, Navy flying officer, and husband of petitioner. Cohn was killed in active service in a plane crash while the contract of insurance was in force and effect.

Before his marriage, insured designated his parents, respondents, as beneficiaries and no change of beneficiary on the form prescribed by the Veterans' Administration was found after his death. The sole question before the United States District Court for the District of Columbia was whether the insured had intended to change the beneficiary of such insurance to his wife, petitioner, and had performed an adequate affirmative act to effect this change. The interest of the United States of America, is that of stakeholder.

The District Court found that a change of beneficiary to petitioner had been intended and effected by insured. The Circuit Court of Appeals reversed this finding on appeal.

II

The Evidence

Kenneth D. Lane, a fellow officer, testified (R. 14) that while stationed at Atlantic City, New Jersey, where he had arrived about June 1, 1944 (R. 21), he secured from the Navy Disbursing Office beneficiary blanks.

> (R. 15) "The day after the skipper had told us of the possibility that we might go out, told us what we should do, we went up in the morning to the disbursing office, and I had often talked to Herbie about changing his insurance. He had always said he was going to, but he was rather lax on legal details, and nothing having come up before I guess nothing had been done about it, but we were on the way to the base hospital, and I told Herbie if he was going to change it now would be a darned good time to do it, and he said he was going to, and that when we got up there in the morning he would do it. * * * He would change it. * * * This

was the day after the skipper had told us; it was approximately the 13th of July, 1944. * * * (R. 16) We went to the Disbursing Office, and I went up to the window with numerous other officers there and got out beneficiary blanks, and I made mine out, and I made mine as I always do, to my wife as the first beneficiary, and to my mother as the second.

"As soon as the blanks were filled out we turned them back to the disbursing officer.

"Q. Did Herbie accompany you? A. He did. I got the blanks and gave him one and kept one.

"Q. From whom did you get the blanks? A. From the disbursing officer who was there; I don't know his name.

"Q. Did you hand the blank to Herbie? A. When I got it, yes, sir.

"Q. Where were you then? A. We filled them out right there at the Disbursing Office; we never left it.

* * * * * * *

"Q. What did you see Herbie do when he signed it? A. He signed it and handed it back to the disbursing officer.

"By the Court:

"Did you see him sign it? A. I saw him sign it but I couldn't say I saw his signature.

"By Mr. Miller:

"Q. Where were you standing? A. About three or four feet from him; we were standing there.

"Q. Standing where? A. At the counter. There was no place to sit.

(R. 17) "Q. State whether or not it was the custom there at the time for beneficiary changes to be effected in that manner? A. Well, yes, sir, as far as I know, if you ever wanted to change your beneficiary you had to go to the Disbursing Office. He was the only one who handled them. That is the only way I had ever

seen it done. It may have been done other ways but that is the only way I know of.

"Q. And after it was signed it was customary to return it to the officer from whom you got it rather than to send it to the Veterans Bureau yourself? A. Oh, yes, sir, we never send them at all. He took care of all that.

"Q. That was the finance officer? A. It was the disbursing officer, it is the same as the finance officer.

"Q. About how long had Herbie been married when this occurred, approximately? A. Well, from February to July, about five months.

"Q. • • • what happened at the hospital after you had crashed that you recall now about the matter? A. Well, Herbie and I was sitting together. I mentioned he was the first one there, and he was the O. D., and I wasn't hurt very badly, and we were talking around and he was asking me what I was trying to do and, joking with him, I told him my wife needed some new clothes, and I thought that was a good way of getting the money, or some words to that effect, and he was saying if anything happened his wife would have the insurance, but he wasn't going to try to do it the way I did deliberately."

• • • • • • •

(R. 18) "Q. Now, while you were down in Harrisburg do you recall anything with reference to this change of beneficiary of his insurance? A. Well, we used to talk about insurance, wills, and things, in case anything happened to us, we both knew it possibly could, and when we left Harrisburg we were ordered to San Diego, both of us, and neither one of us owning a car, and we had a few days off and we wanted to get as many days off as possible, and we figured on going by train that it would cut down our time a little bit, and I was checking into the possibility of going on an airliner, and I told Herbie if I could I would take my wife and that would give us a few more days in San Diego. He wanted to drive, and I said it would

be faster, and I said it would be kind of ironic if we got in an airliner and crashed, we flying all the time, and I said, 'If anything happened, Helene would have the $10,000,' but he said but she would be on the plane, too, so it wouldn't do any good, so he went and bought a car and drove to the Coast."

• • • • • • •

(R. 19) "Q. Did you have occasion to see at any time such a confidential sheet as you describe filled out by Herbie Cohn? A. Yes, I did once in Atlantic City.

"Q. State the circumstances. A. It was right directly after we had been to this disbursing officer, within a day or so, and the skipper handled it, we didn't know how to do that; and Herbie was supposed to have a flight, and he was a little bit late for it, and he filled it out and as he ran for his flight he handed me the sheet and asked me to put it in the envelope, which I did, and I checked the sheet to see if he had signed it because it wouldn't be any good unless he did, and he had.

"Q. And whose name was on there as the beneficiary? A. It named Helene Cohn as the beneficiary for all purposes."

• • • • • • •

"Q. Do you recall whether his Government insurance, national life insurance, was specifically mentioned in this confidential sheet when you saw it? A. No. I don't recall exactly. It asked, as I recall 'Who is the beneficiary.' I don't recall that it stated about that."

• • • • • • •

(R. 20) "Q. Now, Mr. Lane, as I recall it, you testified that at Atlantic City you both received forms from the disbursing officer? A. Yes; well, I got one myself and gave one to Herbie and I kept one.

"Q. And he was three or four feet away from you? A. Approximately.

"Q. And you saw him fill out this form? A. Well, I just noticed that he was filling it out. I didn't read it.

"Q. You didn't see what he put into that form? A. No, sir.

"Q. You saw him sign it? A. Well, yes, making the motions.

"Q. And it was handed back to the disbursing officer? A. Yes, sir.

"Q. So, from your own knowledge, you can testify as to what was on that slip, can you? A. No, sir, I can't."

* * * * * * *

(R. 21) "Q. On cross examination, as I recall, you were asked by Mr. Willcher if you saw what had been written on this form, this change of beneficiary form, when you were standing by him and both of you were up there at Atlantic City, and I believe you said that you did not see what was in the form.

I will ask you did Herbie Cohn indicate to you by words what was in it? A. I asked when we left the building if he had changed his beneficiary and he said 'yes.'

"Q. Did he say to whom? A. No; I just asked him if he had changed his beneficiary. I don't remember asking him to whom."

On June 30, 1944 at Atlantic City, New Jersey (and on three other occasions elsewhere) insured signed a Beneficiary Slip, an official Navy form, (R. 32) in which he named petitioner first beneficiary. The proper purpose of this form was to designate a beneficiary of a six months' gratuity pay, but it had been improperly used on other occasions to designate a beneficiary for insurance and the Navy had officially taken cognizance of this improper use. (R. 29, 39).

Alexander Wakefield, another fellow officer, testified (R. 21) that the insured had told him not more than two weeks before his death that he had made out his insurance

to petitioner. Further, Wakefield said he had been present when the insured and Officer Lane had gone to the Disbursing Office to secure the beneficiary blank at Atlantic City. This witness further testified (original transcript in District Court, pages 42-43):

"Q. Now, do you ever recall discussing change of insurance beneficiary with the late Ensign Cohn?

"A. Yes.

"Q. And he indicated to you precisely what?

"A. That he had changed it to his wife."

• • • • • • • • • •

"By Mr. Willcher:

"Q. There is one question; he never told you that in so many words, did he?

"A. He had told me in Oxnard, California, that he had his insurance made out to his wife."

Petitioner's testimony (original transcript in District Court, p. 52) was that she had been courted by insured some five years before their marriage, after which she went with him from station to station until his death. Insured told her at Atlantic City that he had changed his government insurance to her and he repeated this statement to her on several occasions. (Original transcript in District Court, p. 55, 56).

Respondents' attorney introduced at the trial, *defendant's* Exhibit 22 dated January 10, 1945 District Ct. Record 188-189) which was a "Report of Contact" found in the official files of the Veterans' Administration signed by an official of that Administration, one F. Maloney, Chief Converted Subdivision, which contains the statement, I telephoned Commander Zoller and he stated that in a report from the Commanding Officer regarding the death of the insured, statement was made that the deceased carried insurance in the amount of TenThousand Dollars ($10,000.00),

beneficiary being Helen Sherman Cohn, wife. Commander Zoller stated that a communication would be released by his office at once requesting from the Commanding Officer an explanation concerning the authority for the statement regarding the insurance and beneficiary designation." In a special telegram to the Secretary of the Navy reporting the death of the insured (R 30-31), the officer in charge, Advance Base Barracks, Port Hueneme, California, after advising of the insured's death, stated "beneficiary, Mrs. Helen Elner Cohn, Ten Thousand Dollars ($10,000) Government insurance paid through 31 December, 1944."

On January 27, 1945, the Senior Medical Officer, Advance Base Receiving Barracks, Port Hueneme, California, advised the Chief of the Bureau of Naval Personnel, Washington, D. C. (R 31):

> "1. In reply to Reference (a), the source of beneficiary for the insurance of the subject named officer was obtained from the Naval Auxiliary Air Station, Ventura County Airport, Oxnard, California.
>
> "2. All information in our files reveals Mrs. Helen Elner Cohn as beneficiary."

The testimony of the father respondent (R. 27) was that insured had told him he wanted father and mother to have insurance because his wife's family was well off.

III

Findings of Court

The United States District Court for the District of Columbia tried the case without a jury and found that insured had during his lifetime effectively changed the beneficiary of the National Service Life Insurance from respondents to the petitioner and entered a judgment accordingly.

The Circuit Court of Appeals, District of Columbia Circuit, reversed the findings of the District Court.

IV

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on December 20, 1948. Jurisdiction of this Court is invoked under Title 28, Section 1254, United States Code.

V

Question Presented

The sole question is whether there was sufficient evidence to support the finding of the District Court that a change of beneficiary of the National Service Life Insurance of insured from respondents to petitioner had been effected.

VI

Reasons for Allowance of Writ

1. *The Circuit Court of Appeals has decided an important question of federal law which has not been but should be settled by this Court.*

National Service Life Insurance was issued to practically all military personnel during World War II. Department of Justice records show that as of March 16, 1949, three hundred thirty-eight (338)* cases involving National Service Life Insurance were awaiting adjudication by federal courts throughout the United States. Many thousands more cases are undoubtedly before the Veterans' Administration for consideration and possible later court litigation. The potential litigation is thus very large but could undoubtedly be greatly reduced by a decision of this Court establishing

* Of which 117 cases involve the same issue as here.

basic standards because these cases all relate to conflicting claims of beneficiaries and involve under varying circumstances the same central facts as herein. That is, a young man, unmarried when entering service, names one or both parents as beneficiaries of his National Service Life Insurance. He then marries and dies or is killed in service and the question arises as to whether he changed the beneficiary of his insurance to his wife. A clear outline of fundamentals by this Court would resolve many pending disputes of this kind and the questions presented by this case are a sufficient basis for such action.

2. *The decision of the Circuit Court of Appeals is in conflict with decisions of this and other Circuit Courts of Appeal as follows:*

District of Columbia Circuit—*Rosenschein* v. *Citron,* 169 F. 2d 885.

Second Circuit—*Shapiro* v. *U. S.,* 166 F. 2d 240, cert. denied 334 U. S. 859.

Fourth Circuit—*Roberts* v. *U. S.,* 157 F. 2d 906, cert. denied 330 U. S. 829.

Fifth Circuit—*McKewen* v. *McKewen,* 165 F. 2d 761, cert. denied 334 U. S. 860.

Gann v. *Meek,* 165 F. 2d 857.

Mitchell v. *U. S.,* 165 F. 2d 758.

Ninth Circuit—*Kendig* v. *Kendig, et al.,* 170 F. 2d 750.

3. *The decision of the Circuit Court of Appeals has so far departed from accepted rules of law as to call for exercise of this Court's powers of supervision.*

The Circuit Court has reversed the findings of fact of the District Court which were supported by substantial evidence and has substituted its contrary findings of fact for those of the trial Court on conflicting evidence.

VII

Record

A certified copy of the Transcript of Record in this case in the United States District Court for the District of Columbia and in the United States Circuit Court of Appeals, District of Columbia Circuit, are filed herewith in conformity with Rule 38 of this Court.

VIII

Prayer

Petitioner prays that a proper writ of certiorari be issued directed to said United States Circuit Court of Appeals, District of Columbia Circuit that this cause may be reviewed and reversed, and such other relief granted as may be proper.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No.

HELENE S. COHN,

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vs.

MORRIS B. COHN AND DORA A. COHN,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinions Below

The opinion of the District Court, unreported, appears in the Transcript of the Record herein at page 7.

The opinion of the Circuit Court of Appeals, dated December 20, 1948, is reported at 171 F. 2d 828 and appears in the Transcript of the Record herein at page 48.

II

Jurisdiction

The jurisdiction of this Court is invoked under Title 28, Section 1254, U. S. Code.

III

Statement of Case

The nature of the case and the facts therein and the ruling of the United States Circuit Court of Appeals, District of Columbia Circuit, have already been set forth in the foregoing petition for the Writ of Certiorari, which is adopted as a part of this supporting brief.

IV

Statutes and Regulations

38 U. S. C. A. 802 (g):

> "* * * The insured shall have the right to designate the beneficiary or beneficiaries of the insurance, but only within the classes herein provided, and shall, subject to regulations, at all times have the right to change the beneficiary or beneficiaries of such insurance without the consent of such beneficiary or beneficiaries but only within the classes herein provided."

Veterans' Administration Regulation 10.3447, 7 F. R. 8364:

> "A change of beneficiary to be effective must be made by notice in writing signed by the insured and forwarded to the Veterans' Administration by the insured or his agent, and must contain sufficient information to identify the insured. Whenever practicable such notices shall be given on blanks prescribed by the Veterans' Administration. Upon receipt by the Veterans' Administration, a valid designation or change of beneficiary shall be deemed effective as of the date of execution: * * *"

V

Errors Assigned

1. The Circuit Court of Appeals erred in reversing the findings of fact of the District Court that insured changed the beneficiary of his insurance from respondents to petitioner.

2. The Circuit Court of Appeals erred in making findings of fact contrary to those of the District Court, which findings of fact of the District Court were supported by the proof and were made on conflicting evidence.

3. The Circuit Court of Appeals erred in holding as a matter of law that the act changing the beneficiary must be evidenced by a writing which, if not currently existing, should be proved by established rules for making proof of a lost document.

4. The Circuit Court of Appeals erred in holding that the Beneficiary Slip signed by the insured could not have constituted the act changing the beneficiary.

5. The Circuit Court of Appeals erred in holding case involved proof of a lost document by parol evidence.

VI

Summary of Argument

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL.

THE DISTRICT COURT'S FINDINGS OF FACT THAT THE INSURED CHANGED THE BENEFICIARY OF HIS NATIONAL SERVICE LIFE INSURANCE TO THE PETITIONER WAS SUPPORTED BY SUBSTANTIAL EVIDENCE AND THE ACTION OF THE CIRCUIT COURT OF APPEALS IN SETTING ASIDE THIS FINDING WAS IMPROPER.

THE CIRCUIT COURT OF APPEALS IN REVERSING THE DISTRICT COURT IMPROPERLY MADE CONTRARY FINDINGS

OF FACT TO THE DISTRICT COURT ON CONFLICTING EVIDENCE.

THERE IS NO STATUTORY OR OTHER MANDATORY REQUIREMENT THAT THE REQUISITE AFFIRMATIVE ACT TO CHANGE THE BENEFICIARY OF NATIONAL SERVICE LIFE INSURANCE BE EVIDENCED IN WRITING. ALL THAT IS REQUIRED IS THAT THE INSURED DO EVERYTHING REASONABLY WITHIN HIS POWER TO EFFECT THE CHANGE AND THAT THERE BE SATISFACTORY EVIDENCE OF SUCH ACTION. THE VETERANS' ADMINISTRATION REGULATION REQUIRING THAT THE CHANGE OF BENEFICIARY BE IN WRITING IS FOR THE BENEFIT OF THE INSURER AND WAS WAIVED.

THE BENEFICIARY SLIP SIGNED BY THE INSURED ON JUNE 30, 1944, COULD HAVE CONSTITUTED THE NECESSARY AFFIRMATIVE ACT BY THE INSURED UNDER THE EVIDENCE ADDUCED AT THE TRIAL.

THE THEORY OF THE CASE AS TRIED BY THE DISTRICT COURT DID NOT INVOLVE SECONDARY PROOF OF A DOCUMENT CHANGING THE BENEFICIARY OF THE INSURANCE BUT ONLY PROOF OF AN ACT BY INSURED EVIDENCING SUCH CHANGE. THE CIRCUIT COURT OF APPEALS WAS WRONG THEREFORE, IN APPLYING TO THE EVIDENCE THE TECHNICAL STANDARDS FOR PROVING A KNOWN, LOST WRITTEN DOCUMENT FORMING THE BASIC SUBJECT MATTER IN LITIGATION, SUCH AS A SUIT UPON A LOST CONTRACT.

VII

ARGUMENT

A. The Decision of the Circuit Court of Appeals Is in Conflict With the Decisions of Other Circuit Courts of Appeals.

1. *In holding that the Beneficiary Slip, whose proper use was to designate a beneficiary for gratuity pay, could not have been used, under the evidence, to change the beneficiary of the insurance.*

At the trial evidence was offered by the petitioner from which the Court could have concluded that the insured was given the Beneficiary Slip to change the beneficiary of his insurance (R. 15). There was also evidence that the Beneficiary Slip had been improperly used on other occasions

to designate insurance beneficiaries and that this improper use had been officially noticed by the Navy Department (R. 29, 39).

In *Shapiro* vs. *United States,* 166 F. 2d. 240; Certiorari denied 334 U. S. 859, a Second Circuit case, and *Rosenschein* vs. *Citron,* 169 F. 2d 885, decided by the Circuit Court of Appeals, District of Columbia Circuit, changes of insurance beneficiaries were found to have been effected by the execution of War Department Forms WD AGO 41. These forms were also officially designed for six months' gratuity pay beneficiaries in the War Department. The only substantial difference in these War Department Forms 41 from the Beneficiary Slip as used in the Navy was that the latter contained a statement with respect to the statute under which the six months' gratuity pay was made. They were both originally intended for the same purpose, to-wit, the 6 months' gratuity pay. An examination of the District Court record (p. 150), plaintiff's original Exhibit No. 7, on file in this Court will show that the references to the gratuity pay statute was in fine print, whereas the words "Beneficiary Slip" were in large print, and the over-all language of the Beneficiary Slip form was ambiguous and susceptible to interpretation as to its proper use. In the Shapiro and Rosenschein cases, there was evidence that the Forms 41 had on occasions been improperly used to designate beneficiaries of insurance, as was the proof in the instant case (R. 29, 39).

On the basis of the facts, therefore, there is a clear conflict between the decision of the Circuit Court of Appeals in this case and the decisions in the Shapiro and Rosenschein cases, *supra.*

2. *In holding as a matter of law that the act changing the beneficiary must be evidenced by a writing which, if not currently existing, should be proved by the well established rules for making proof of a lost document.*

The unanimous standard applied by other Circuit Courts of Appeal is that the insured do everything reasonably within his power to change the beneficiary, leaving only ministerial acts to be performed by the insurer.[1] And it is a jury question as to whether insured did do everything reasonably within his power to effect the change. *Gann* v. *Meek*, 165 F. 2d 857. In none of these Circuit Court opinions is it stated as a mandatory requirement that the act of change be evidenced by a writing.

The test applied in these cases by other Circuit Courts of Appeals takes particular notice of the war time factor in making its yardstick flexible enough to prevent miscarriage of a soldier's intention by "brushing aside technicalities."[1]

3. *In holding that the Veterans' Administration regulation requiring that a change of beneficiary be in writing is for the protection of the beneficiaries.*

The unanimous holding of other Circuit Courts is that Veterans' Administration regulation requiring a change of beneficiary to be in writing is for the benefit of the insurer and may be waived.[1]

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[1] *Roberts* v. *U. S.*, 157 F. 2d 906 (CCA 4), Cert. denied, 330 U. S. 829;
McKewen v. *McKewen*, 165 F. 2d 761 (CCA 5), Cert. denied, 334 U. S. 860;
Kendig v. *Kendig*, 170 F. 2d 750 (CCA 9);
Mitchell v. *U. S.*, 165 F. 2d 758;
Gann v. *Meek*, 165 F. 2d 857.

B. The Decision of the Circuit Court of Appeals has so far departed from settled rules of law as to call for the exercise of this Court's powers of supervision.

1. *For reversing the findings of fact of the District Court that the insured changed the beneficiary of his National Service Life Insurance to the petitioner, which findings of fact (R. 8) are supported by the evidence.*

Two fellow officers testified that insured told them he had changed beneficiary to petitioner (R. 17, 23).

A telegram from Officer in Charge, Port Hueneme, California, to Secretary of Navy (R. 30) in reporting death of insured, said petitioner was beneficiary of the insurance and a memorandum to the Chief of Bureau of Naval Personnel (R. 31) stated "all information in our files reveals Mrs. Helene Elner Cohn (petitioner) as beneficiary." A "Report of Contact" by Veterans' Administration with Navy Department reflected that insured's Commanding Officer had reported to Navy Department that petitioner was beneficiary. (District Ct. Record, pp. 188, 189). The air station where insured was stationed at time of death had been decommissioned (R. 41) by the time a search for documents relating to the beneficiary of the insurance was made.

The universal yardstick applied in cases of this kind is to determine whether the insured serviceman intended to change the beneficiary of his insurance and acted affirmatively to effect the change. The proof here meets this standard by a wide margin.[2]

About the 13th of July, 1944, the insured, accompanied by the witness Lane, went to the Disbursing Office, Lane obtained blanks from the Disbursing Officer and gave the insured one and both of them filled them out at the Disburs-

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[2] *Bradley* v. *U. S., supra; Roberts* v. *U. S., supra; McKewen* v. *McKewen, supra; Shapiro* v. *U. S., supra; Kendig* v. *Kendig, supra.*

ing Office and Lane who was standing three or four feet away from the insured at the counter, saw the insured sign his and hand it back to the Disbursing Officer (R. 16). It was the practice (R. 17) in changing beneficiaries to go to the Disbursing Officer as such officer was the only one who handled changes of beneficiaries. The insured told Lane that if anything happened his (the insured's) wife would have the insurance. Within a day or so thereafter (R. 19) Lane looked over a "confidential sheet" filled out by the insured which named "Helene Cohn as the beneficiary for all purposes". The District Court found (R. 9) that "on *or about* July 13, 1944, the insured changed the designation of the beneficiary of said insurance from his mother and father to his wife" and this finding was amply supported by the evidence.

The Court below not only failed to give petitioner's evidence the inferences properly deducible but in effect holds that notwithstanding the many statements made by the insured that he had changed the beneficiary to his wife, in effect imputes to this insured or to petitioner's witness a purpose to lie for which there is no support in the testimony. (*Senate* v. *U. S.*, 78 Fed. Supp. 536.)

As was said in *Helmholz* v. *Horst,* 294 Fed. 417, 420:

> "The insured owed a legal duty to support his wife and the most natural thing for him to have done under all the circumstances was to have named her as beneficiary in his war risk insurance, instead of his sister.
>
> "It is urged on behalf of appellee that the change of the beneficiary was not made in the manner required by the regulations, and that the change could only be made in the manner as provided. The regulations, however, were largely for the protection of the government, and could be waived by the government. Deceased was in the military service and made an effort, in good faith, to have this policy changed. He applied to the officers in charge of that branch of the service, re-

quested them to make the change, and was given what seemed to him assurance that the change either had been or would be made. The evidence is convincing that the insured intended to change the beneficiary and name the plaintiff instead of his sister as such beneficiary. Mere intention so to do is not sufficient, but here this intention was followed by acts through which he attempted to accomplish this change. Not only did the insured express his purpose and intention to make this change, but he did everything he might reasonably have been expected to do, under the circumstances, to effectuate such change."

The Navy officers completely dominated the insured's actions and he cannot be held responsible when he did all he could do under the circumstances to effect the change of beneficiary.

Since the District Court's findings of fact were adequately supported by the proof, the action of the Circuit Court of Appeals in reversing these findings is contrary to well settled fundamental principles of law.[3]

2. *For making findings of fact on conflicting evidence contrary to the District Court:*

The language of the Circuit Court of Appeals throughout its opinion (R. 48) is such as to discredit expressly and by implication the proof offered by the plaintiff at the trial and to look favorably upon the evidence offered by the defendant. For example, the Court below said (R. 49):

"In the present case, the deceased officer had been married ten months when he was killed. There was testimony that the wife and her family were 'all well off', whereas the deceased's father and mother were

[3] Rule 52, Federal Rules of Civil Procedure; *U. S.* v. *Alvord*, 66 F. 2d 455, cert. denied, 291 U. S. 661; *Calhoun* v. *Stratton*, 61 F. 2d 302; *U. S.* v. *Algodones Land Company*, 52 F. 2d 539; 5 C.J.S., Section 1655 and 1656, pages 675-682.

> 'in kind of hard circumstances', the father working on a beer truck. There was also testimony that Cohn had said to his father that 'although they have been putting a lot of pressure on me to have this transferred into Helene's name, but I think I personally want it for you and mother in case something does happen to me.' There is no scrap of writing, either presented or described orally which shows that the deceased ever changed the beneficiaries named on his policy."

The opinion questions the motives of plaintiff's witnesses and its overall effect creates an atmosphere suggestive of fraud, wholly unwarranted by the evidence. Typical statements from the opinion are (R. 50).

> "The suggestion that it (the Beneficiary Slip) be deemed to be a change in the beneficiary of life insurance is so preposterous as to throw doubt upon the sincerity of the suggester."

and (R. 49):

> "We are constrained to speak a word of warning concerning the cases of which this is one, and of which so many seem to be appearing in the courts. On the one hand, it is highly desirable that the wishes of servicemen in respect to their insurance be observed, and the courts should be diligent to that end, disregarding mere technicalities and formalities of all sorts. But, on the other hand, it is equally important that the door not be opened to the enormous frauds obviously latent in the situation if basic minima of proof be disregarded. • • • We are struck by the loose use of 'beneficiary' and 'beneficiary slip' throughout the case, as though those terms always referred to life insurance."

and again (R. 50):

> "• • • we are impressed by the insistent part played by the key witness for appellee Cohn in this whole matter. He testified 'I had often talked to Herbie

(Cohn) about changing his insurance'; 'I told Herbie if he was going to change it now would be a darned good time to do it'; and 'I got the blanks and gave him one and kept one.' "

In this latter instance the Circuit Court of Appeals apparently found something insidious in the fact that this witness, a war time buddy of the dead aviator, often talked to Cohn about insurance and helped him do certain things in connection with it. There can be no doubt from the opinion that the Circuit Court of Appeals made different findings of fact on the trial evidence than did the District Court. And further, there can be no doubt that these different findings were necessary as a basis for the Circuit Court of Appeals' reversal.

This can be strikingly seen in the Court's reaction to the evidence relating to the Beneficiary Slip (R. 50):

> "Appellee suggests that a 'beneficiary slip' executed by this decedent was a change in the beneficiary of his life insurance. The form called for the name and address of the officer's wife; they were so entered. The form, in terms, related to the six months' pay allowance to a widow. No testimony explanatory of or relating to the document was proffered."

The trial record *does* reflect evidence relating to the Beneficiary Slip and explaining its use. There was an official Navy Bulletin (R. 39) and testimony by a Naval Officer (R. 28) indicating the Beneficiary Slip form had been improperly used to change the beneficiary of Government Life Insurance, and, there is testimony in the record of insured's fellow officer about his getting and executing a beneficiary "blank" with insured in connection with their insurance at or about the time insured signed one of the Beneficiary Slips (R. 15, 16).

The action by the Circuit Court of Appeals in making contrary findings of fact to the District Court on conflicting

evidence is contrary to the universal rule that the findings of fact of the trial Court are conclusive upon appellate courts, unless clearly wrong or wholly unsupported by the evidence which was not the case here.[4]

C. There is no statutory or other mandatory requirement that a change of beneficiary be evidenced by a writing signed by the insured.

Under the National Service Life Insurance Act, 38 U. S. C. A. 802 (g), the insured had the right to change the beneficiary at any time without the consent of the beneficiary. The requirement by Veterans' Administration Regulation (see P. 10, this brief) that the change of beneficiary be in writing is for the benefit of the insurer and may be waived. *Bradley* v. *U. S.*, (143 Fed. 578), states the purpose of the regulation to be:

> "* * * to create a legal standard for the orderly administration of the Act by providing a means and method for the exercise of the statutory right of the insured to change the beneficiary of his insurance, and to protect the insurer against conflicting claims for the proceeds of the policy. See Claffy *v.* Forbes, D. C., 280 F. 233; Peart *v.* Chaze, D. C. 13 F. 2d 908; Chichiarelli *v.* United States, D. C. 26 F. 2d 484; Farley *v.* United States, D. C., 291 F. 238."

Since the insured may change the beneficiary at will, the latter has no vested right in the insurance and cannot object to a waiver by the insurer of procedures designed for its protection.[5] In this case the insurer has waived the right

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[4] *Ott* v. *Long Beach Company*, 70 F. 2d 1, Cert. denied, 293 U. S. 588; *Crown Central Petroleum Corporation* v. *Bates*, 37 F. 2d 508, Cert. denied, 281 U. S. 743; 5 C.J.S., Section 1657, page 722; *Hudson* v. *Texas Gulf Sulphur Co.*, 72 F. 2d 251, Cert. denied, 293 U. S. 617; *Frank* v. *Atwood*, 75 F. 2d 918.

[5] *Reid* v. *Durboraw*, 272 F. 99; Cyclopedia of Insurance Law, Couch, Vol. 2, Section 315a, page 866; *White* v. *U. S.*, 270 U. S. 175.

to object to the fact that the change of beneficiary does not meet the requirements of its regulation by, in effect, paying the insurance money into the Court as in the nature of an interpleader [6] (R. 6).

In *Farley* v. *U. S.*, 291 F. 238, a World War I Government Insurance case, where the law and regulations relating to change of beneficiaries were substantially identical, the evidence showed that the insured applied for a blank with which to change the beneficiary of his Government insurance and made it out and filed it with his company clerk where it became lost and was never found. The Court held that a change had occurred even though it was not evidenced by a writing in existence.

The trial Court must, of course, be satisfied that there is adequate, competent evidence that the insured acted to change the beneficiary of his insurance. However, this evidence need not *necessarily* include a writing by the insured and no Circuit Court of Appeals has made such a minimum requirement. The correct yardstick is whether insured did everything within his power to change the beneficiary leaving only ministerial acts to be performed by the insurer.[7]

The Circuit Court of Appeals in its opinion misconstrues the purpose of the Veterans' Administration Regulation when it states that the requirement of these regulations that a change of beneficiary be in writing ". . . is the minimum necessary to protect the public, the families, and the loved ones of service men and the interests of the insured deceased veterans themselves against unmitigated fraud." This language strongly suggests that the Regulation is for the benefit of the beneficiary. Such an interpretation during war time conditions of military service would more

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[6] *Supreme Council* v. *Cappella* (CCA), 41 F. 1; *Supreme Council* v. *Churld*, 263 F. 755.

[7] See footnote (1), p. 13.

nearly result in injustices than would the proper requirement of brushing aside technicalities to give effect to the manifest intent of the soldier, which is the approach to the problem taken by other Circuit Courts of Appeal.[8]

D. The Beneficiary Slip signed by insured on June 30, 1944, could have constituted the act of change under the proof adduced at the trial.

This Beneficiary Slip form had on occasions been improperly used to change the beneficiary of Government (National Service) Life Insurance as evidenced by an official Navy Regulation (R. 39) and by the testimony of a naval officer (R. 29). A fellow officer of the insured testified that insured had signed a beneficiary "blank" at about the same time as the Beneficiary Slip of June 30, 1943, was signed and that this beneficiary blank was signed for the purpose of changing the beneficiary of insured's government insurance (R. 15, 16). While it is true that the Circuit Court of Appeals may have disagreed with the inferences and conclusions of fact drawn from this evidence, this is not enough to properly make a contrary finding of fact as a basis for reversing the decision of the trial Court.

E. This case did not involve establishing a known lost document by secondary evidence as the Circuit Court of Appeals in its opinion assumes (R. 49).

The precise act or method by which insured changed the beneficiary of his insurance was not known. The proof submitted was intended as proof that insured *had* acted, *and not proof of the act itself.* And this situation is quite usual in decided cases of this kind.[9]

A typical situation is where the insured service man after

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[8] See footnote (2), p. 19.

[9] See cases cited footnote (1), p. 18.

marriage states in a letter or other document that he has taken out Government (National Service Life) Insurance and *has* made his wife the beneficiary. The actual change of beneficiary is not to be found and there is no evidence as to just what form it might have taken. In all such cases it is never considered a question of proving by secondary evidence what the act of change was but rather a question of determining by the available evidence whether or not the insured performed an affirmative act sufficient to change the beneficiary. The Circuit Court of Appeals has misunderstood the issue and the proof in the Court below in grounding its decision upon an alleged failure of that proof to meet the standards for proving a *known* lost document (contract) by secondary evidence. The correct rule applicable to the facts in the instant case is the fundamental "best evidence rule." 32 C. J. S. p. 703, Section 778:

> "The 'best evidence rule' does not demand that the strongest possible evidence of the matter in dispute shall be given, nor that all evidence existing in the case shall be produced, but requires simply that no evidence shall be given from which, considering its own character and the nature of the transaction, an inference may arise that there is obtainable by the party other evidence more direct and conclusive and more nearly original in its source." Citing, U. S.—Minor *v.* Tillotson, La., 7 Pet. 99, 8 L. Ed. 621; —U. S. Sugar Refinery *v.* E. P. Allis Co., C. C. A. Ill., 56 F. 786.

The proof here easily rises to this standard. First, we have evidence of the execution of a confidential sheet by insured naming petitioner beneficiary for all purposes (R. 19). The actual existence of such a Navy form and its use to designate a beneficiary of government insurance is guaranteed by an official Navy Bulletin (R. 39) and by its appearance in other Circuit Courts cases. In *Kendig* v. *Kendig, et al.*, 170 F. 2d 750, where the insured filled out such a con-

fidential sheet or statement at Atlantic City, New Jersey, in 1944 (as in the instant case) the Court said:

> "* * * This statement was shown appellant by Kendig's squadron commander after Kendig's death. We understand it to be the practice at the United States Naval Air Stations to have these confidential forms filled out by each officer upon his reporting for duty. The statement is then sealed and placed with the officer's records to be opened only in the event of the death or serious injury of the officer concerned."

What better proof of loss could be submitted when none of these confidential sheets could be found after insured's death. In *Roberts* v. *United States, supra,* which also involved a Navy officer, a confidential form was also found among the effects of deceased and considered by Court as *evidence* of the act of change.

Then, too, there was evidence that the air base where insured met his death was decommissioned (R. 40) after a telegram reporting his death (R. 30) had stated petitioner was beneficiary of insured and after a memorandum of the Senior Medical officer (R. 41) had said "All information in our files reveals Mrs. Helen Elner Cohn as beneficiary "of the insurance." [10] And, also, the trial court, had before it an official Veterans' Administration Report of Contact (District Court Record p. —) reflecting that insured's Commanding Officer had stated that petitioner was beneficiary of insurance.[10]

In the *Roberts* case the Court was able to understand the loss of the change of beneficiary "when one considers the volume of business transacted at military posts and the

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[10] In *Walker* v. *United States,* 70 F. Supp. 422, the District Court in finding evidence of the act of change in a "Report of Death" form said: "This information (that on a "Report of Death") respecting the wife as beneficiary of the insured reached the War Department in some way. I think it came from the Insured."

character of the administrative organization thrown together to meet the emergency of war." In the instant case the trial judge had the additional circumstance of the decommissioning of the Naval installation where the records relating to the insured would have been properly kept, and he, too, was able to understand the loss of the particular document.

Certainly there was adequate proof that insured had acted, even though the medium by which he acted was not located, although the Beneficiary Slip, under the evidence, could have been the act or certainly some guarantee of the act. In *Roberts* v. *U. S., supra,* the Court said:

> "Moreover, it cannot be disputed that both officers executed the beneficiary slip for the bonus in favor of their wives * * * because the documents were produced."

Clearly, the evidence in this case leaves no doubt that insured acted to give effect to his intention to change the beneficiary of his National Service Life Insurance. And, just as clearly, do the facts reflect that this is not a proper case to apply the rule of evidence regarding proof of a known lost document by parol. The paper by which insured acted was not known and was not decisive as would be a contract forming the basis of a particular litigation. Here the crucial point was whether insured acted and satisfactory proof of this could be given, and was given, without knowing by just what document or means he acted.

Conclusion

It is respectfully submitted that the petition for Writ of Certiorari be granted.

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